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BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET No. 35260

**WATCO COMPANIES, INC.
- CONTINUANCE OF CONTROL EXEMPTION -
BOISE VALLEY RAILROAD, INC.**



**PETITION TO REJECT WATCO'S CONTINUANCE IN CONTROL
EXEMPTION - BOISE VALLEY RAILROAD, INC**

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Dated: October 15, 2009

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**WATCO COMPANIES, INC.
– CONTINUANCE OF CONTROL EXEMPTION –
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EXEMPTION – BOISE VALLEY RAILROAD, INC**

I. PROCEDURAL HISTORY

On September 16, 2009 Watco Companies, Inc. (Watco) filed with the Surface Transportation Board a Notice of Exemption pursuant to 49 C.F.R. § 1180.2(d)(2) to Continue in Control of Boise Valley Railroad, Inc. (BVR).

Watco created and wholly owns BVR. Watco created BVR “for the purpose of leasing and operating certain rail lines in Idaho owned by the Union Pacific (UP) and currently leased and operated by Idaho Northern & Pacific Railroad Company (INPR).” *Watco Notice of Exemption*, STB Finance Docket No. 35260.

Concurrently with the Notice of Exemption for Continuance in Control, BVR filed a Notice of Assignment of Lease Exemption pursuant to 49 C.F.R. Part 1150, Subpart D – Exempt Transactions “to permit BVR to acquire, by

assignment from INPR, the lease and operating rights to rail lines owned by the UP." *BVR Notice of Exemption*, STB Finance Docket No. 35259.

These two Notices of Exemption become effective October 16, 2009 unless the Board forestalls them.

II. JURISDICTION

The Board has jurisdiction over this matter pursuant to 49 U.S.C. § 10502.

III. FEDERAL RAIL TRANSPORTATION POLICIES REQUIRE DENIAL OF EXEMPTIONS FOR WATCO AND ITS RELATED OPERATIONS.

The Board may exempt a Class II or III railroad from the 49 U.S.C. § 10902 requirements of a certification proceeding when the carrier, *inter alia*, seeks to acquire or operate an additional rail line. The Board may grant such an Exemption under the authority of 49 U.S.C. § 10502 "whenever the Board finds that the application in whole or in part of a provision of this part—

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either--

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power."

Prior to executing this exemption power the Board must first consider the Rail Transportation Policy of § 10101 which establishes 15 standards which protect the public, labor and the marketplace from unfair and unsafe conditions. (See *Village of Palestine v. ICC*, 936 F.2d 1335, 1338-40 (D.C. Cir. 1991) holding that the Commission (Board), prior to authorizing an exemption, must first determine that the criteria of the RTP are "satisfied"). The Board may also consider "whether regulation of the transaction is necessary to carry out the

Policy.” *City of Ottumwa v. Surface Transp. Bd.*, 153 F.3d 879 (8th Cir. 1998) (citing the standards of a petition to revoke an exemption).

The power of the Board to issue such exemptions exists for the purpose of limiting federal regulation of the railroad industry, specifically Class II and III railroads which presumably do not have the same impact on the national transportation system as do Class I’s. However Watco and its subsidiary railroads have a substantial history of willfully violating federal labor and safety laws. Because of these violations and because of the unique national reach of Watco’s operations the standard exemption procedures are insufficient to establish a full record upon which to base a decision. Of primary concern is Watco’s lack of compliance with the relevant RTP criteria cited here:

“(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required”;

“(8) to operate transportation facilities and equipment without detriment to the public health and safety”;

“(9) to encourage honest and efficient management of railroads”;

“(11) to encourage fair wages and safe and suitable working conditions in the railroad industry”;

49 U.S.C. § 10101.

When a carrier cannot or will not conform its operations to the RTP, the Board cannot grant a Notice of Exemption **as a matter of law**.

“If the ICC were to grant an exemption without determining that the regulation is not needed to carry out the rail transportation policy of § 10101a *and either* the exempt transaction is of limited scope *or* the regulation is not needed to protect shippers from abuse of market power, the ICC would stand in plain violation of its statutory authority....” *Illinois Commerce Com’n v. ICC*, 819 F.2d 311, 315 (D.C. Cir. 1987) (emphasis in original).

IV. WATCO IS A UNIQUE OPERATION: ITS PROPOSED TRANSACTION MUST FACE GREATER SCRUTINY THAN EXEMPTION PROCEDURES ALLOW

As the self-proclaimed largest short-line operator in the U.S., Watco controls approximately 4000 miles of track in 18 states providing service on its 21 short-line railroads and moves over 500,000 car loads annually. See *Watco Companies Website*;¹ See also Rick Webb, *Testimony before U.S. House of Representatives Subcommittee on Railroads, Pipelines, and Hazardous Material* (January 28, 2009).² Additionally Watco permits Class I carriers access to its track to haul substantial ton miles. Due to this inextricable link between Class I rail operations and Watco, Watco should not be viewed in the light envisioned by the § 10502 power of exemption from STB certification proceedings for Class III carriers.

This was never more evident than on August 22, 2008 when a Burlington Northern train, traveling over track operated by the Stillwater Central Railroad (a Watco company), derailed near Oklahoma City in such a spectacular fashion that the resulting explosion created a mushroom cloud which could be seen for miles.³ It was just pure luck that this derailment did not occur in a more populated area, or at a time when the wind was blowing in a different direction, where the crude oil and ethanol which were released into the atmosphere would have caused much greater harm.

¹ <http://www.watcocompanies.com/railroads.htm>

² Video of the Webb testimony available at approximately the 38:00 minute mark: <http://transportation.edgeboss.net/wmedia/transportation/20090128rr.wvx>.

³ See video of the aftermath of the derailment at http://www.youtube.com/watch?v=rlqSA9JXzVw&feature=PlayList&p=DEA4144331BEB231&playnext=1&playnext_from=PL&index=42.

Unfortunately such safety lapses are common rather than uncommon when it comes to Watco operations. Of the Class III railroads with the poorest safety records in the three most recently completed years ending in 2008, Watco owns 6 of the top 18, including the railroad with the absolute worst safety record. See, FRA safety website.⁴ It can be said without exaggeration that Watco is the “worst of the worst.” Such domination of the “Worst” list is not a coincidence; it reflects an underlying company-wide lack of concern for rail safety. It follows logically that if Watco is allowed to use the exemption procedures as a mere formality on its way to continued expansion it will never make any effort to improve its safety record. Near catastrophes like that BNSF derailment, wreck, and explosion in August 2008 are more likely to be repeated by Watco railroads than on other railroads controlled by other holding companies, subjecting more people in more parts of the country to severe physical, emotional and financial harm.

Such a conclusion is not a guess but rather a fact as stated by Watco CEO Rick Webb. Testifying before the 111th Congress in January of this year, Webb acknowledged that short-line railroads, while accounting for one-third of the national railroad network, “operate the most vulnerable track in the system,” track which has “enormous rehabilitation needs.” *Testimony*, supra. However Webb further testified that while they have been “very successful” at turning a profit on these lines, they are unable to fund “the enormous cost of eliminating deferred maintenance.” *Id.* The question begs, if not to safety, where is the profit going? Webb’s testimony seeking federal grants and Watco’s previous

⁴ <http://safetydata.fra.dot.gov/officeofsafety/publicsite/Query/inctally3.aspx>

acceptance of federal loans strongly suggests that Watco lacks adequate capital to fund its operations in a safe manner. See *Testimony, supra*; also federal Railroad Rehabilitation and Improvement Financing loan of \$4.6 million to Watco railroad Stillwater Central (<http://www.fra.dot.gov/us/content/177>). Logic dictates that if Watco is unable to finance the maintenance of its current track then allowing the company to acquire additional lines and operations would be irresponsible at best.

Because of the relationship between Watco and Class I traffic and the company priorities of expansion and profit over safety, the safety practices of Watco are of paramount importance to ensuring compliance with the RTP. Prior to granting any exemption to Watco the Board needs information from Watco including but not limited to disclosure of the condition of all of the track it controls including the total track miles of Excepted track which it currently operates, and details of the trends of reclassification of track, the amount of Class I traffic, ton miles of hazmat, the classifications of the hazmat which travels over Watco controlled track, and the condition of said track.

V. ANTI-UNION ANIMUS IS FUNDAMENTAL TO WATCO OPERATIONS

Watco has been sued and cited repeatedly for anti-union retaliation, illegal interference in union elections, threats and intimidation of union supporters, and has had judgments for punitive damages entered against it for intentional retaliatory discharge of union sympathizers who were innocent of any wrongdoing. See *In the Matter of the Brotherhood of Locomotive Engineers and Trainmen*, 33 NMB No. 24 (2006) (NMB ordered a re-run election after finding

that Watco subsidiary Stillwater Central Railroad tainted the laboratory conditions required for a fair union election); *Morton v. Watco Companies, Inc.*, 2007 WL 2743732 (W.D.Okla. 2007) (Jury awarded three railroad workers over \$600k in damages, including \$145k each in punitives, after they were found to have been fired by the Stillwater Central Railroad for attempting to form a union). None of these orders, judgments and settlements has had the slightest deterrent affect on Watco. At present Watco continues to pay no regard to a negotiated Collective Bargaining Agreement with the BMWED and has demonstrated an equal contempt for state wage payment laws and the Fair Labor Standards Act.

Watco's pay levels on its small railroads are barely half the rates prevailing on America's railroads, of all sizes. The pay and working conditions are so substandard that, even in times of high unemployment, Watco's properties' typically run between a 25 and 50 percent turnover per year. See Ja'Rena Lunsford, *The Oklahoman, Three Railroad Workers Win Termination Lawsuit*, (September 21, 2007)⁵ (Citing unsafe operations and violations of safety rules and regulations on the Stillwater Central).

Watco's lack of respect for organized labor and its habitual flaunting of state and federal wage statutes and defiance of the National Mediation Board, Federal Railroad Administration, the courts and Congress must not be rewarded. The Board must not allow Watco to cast its net upon another workforce until the company can demonstrate its ability to operate without continual oversight by federal agencies.

⁵ Article available at: <http://newsok.com/article/3130693/1190342672#ixzz0TqPfAMW9>.

VI. WATCO HAS ALREADY ATTEMPTED, WITH NO SUCCESS, ITS SUBVERSIVE TACTICS BEFORE THE BOARD

As recently as 2007 Watco attempted to hoodwink the Board into approving its transaction to acquire and operate rail lines of the Norfolk Southern. *Watco Companies, Inc. and Watco Transportation Services, Inc. – Continuance in Control Exemption – Michigan Central Railway, LLC.*, STB Finance Docket No. 35064 (Service Date December 10, 2007). Under protest from, among others, the Brotherhood of Maintenance of Way Employees Division, which deemed the proposed transaction a "sham," the Board saw through the Watco attempt to sidestep the very statutory scheme invoked here and denied the exemption.

Such history shows that more lies beneath the surface of the bare exemption filings of Watco and that absent simple Board intervention, this company, a large player in the nations' rail operations, will continue in violating the fundamental provisions of the Rail Transportation Policy.

VII. CONCLUSION

Given the critical unsatisfied elements of Watco compliance with the cited sections of the RTP and Watco's chronic offender status, the Board should exhibit the utmost caution before ruling on the exemption. Only good results can come from Board inquiries which will shed light on the Watco operations.

In allowing for the development of an extensive record in this matter the Board will perform its statutory duty to continue to implement critical aspects of the RTP under § 10101. The Board, by doing its duty, will continue to protect the national labor and safety interests.

VIII. PRAYER FOR RELIEF

For the reasons stated above, petitioner BMWED requests that the Board:

1. Reject the Watco Notice of Exemption of Continuance in Control of the BVR;
2. In the event additional information is needed, conduct discovery of the matters relating to the RTP raised in this petition, or in the alternative designate the BMWED to conduct such discovery;
3. Establish, as needed, a procedural schedule to include timing for discovery, amended or additional filings, public comments and a hearing before the Board; and
4. Such other relief as the Board deems equitable under the circumstances.

Respectfully submitted,

By: /s/ Charles A. Collins

Dated: October 15, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have served all parties of record in this proceeding with this document by hand delivery.

/s/ Charles A. Collins
October 15, 2009

DECLARATION

I, Charles A. Collins, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this pleading. Executed October 15, 2009.

/s/ Charles A. Collins